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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1958

No. [redacted] 28

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

I.

Your petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this cause, Civil No. 15,740 in said Court.

OPINION BELOW.

The majority and dissenting opinions, both upon the original hearing and upon the petition for rehearing are reported in 248 F.2d 879, and are herein printed in the Appendix to this Petition, pp. A2 to A23. The judgment of the trial court which was reversed appears in the Record.

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under 28 United States Code, Sections 1254 (1) and 2101 (c), providing for review by this Court by certiorari of decisions of a Court of Appeals.

The date of the opinion sought to be reviewed was November 5, 1957. A petition for rehearing was filed in apt time, and was denied on December 6, 1957, and the judgment reversing the District Court became final on that date.

QUESTIONS PRESENTED.

I.

Violation of the Erie Rule by the Court of Appeals.

The Court of Appeals reversed a judgment upon a verdict for a plaintiff wherein the trial court followed the Iowa decisions by the court of last resort both as to *how*, *when* and *by whom* an insurance company can extricate itself from a printed contract of preliminary insurance made in the state of Iowa, including the Iowa doctrine of "mending his hold".

While the prevailing opinion on appeal purports to be finding what the Iowa law is, it does not follow latest Iowa decisions, as the trial court did, but cites and quotes at length from *Mofrad* v. *New York Life,* (10th Circuit) 206 F.2d 491, a Utah contract, and the opinion seems to hold that because that is the Utah law it should be the Iowa law. The opinion is influenced by the quotation and citation from non-Iowa cases set out on pages A10 to A17 thereof, and shows on its face that the majority does not abide by the rule in *Erie Railway* v. *Tompkins,* 304 U.S. 64.

The trial court required a strict compliance with the exact words of the contract as drafted by the insurance company with regard to the "defeasance" clause in accord with the decisions of the Supreme Court of Iowa, which Iowa law is as follows:

> "Although an insurance company, even after it learns of the death of insured, may exercise its power under the defeasance clause somewhat similar to that printed herein, when it had previously begun to process the application in its regular channels before knowledge of death, if it completed its customary investigation and determined in the usual course of passing on applications not to issue a permanent policy based upon a good faith finding by those in authority at the home office that he was not insurable because of bad health."
>
> *Reynolds* v. *Northwestern Mutual Life,* 189 Iowa 76, 176 N.W. 207.

> "But this power to avoid a contract under the express defeasance clause is terminated by the company giving some other excuse for not performing ('Mending his hold') and power can only be exercised by those authorized by their by-laws, and in the due course of company procedure."
>
> *Farmers Milling Co.* v. *Ins. Co.,* 127 Iowa 315, 103 N.W. 207.

The trial court held that there was no pleading and no evidence of any attempt of defendant to exercise its power under the defeasance clause, and thus to avoid the contract, within the time and in the manner required by the Iowa decisions.

The Court of Appeals disregarded these decisions of the Supreme Court of Iowa and the holding of the Trial court and Iowa Code, § 511.34, and held on page A18 of their opinion that defendant had "made a determination" that Hinkle was not insurable, disregarding the time and manner required. Also defendant never claimed either in its evidence, its pleading, or errors argued, that it ever attempted to make such a determination, and the only evidence was that defendant's General Agent for Iowa tried to "bluff out" the widow into believing that there was no contract of insurance. Their vice president testified they had no record that they had ever received the application (Record p. 47). It also disregarded the spirit of Iowa decisions that defeasance clauses must be strictly followed to avoid forfeitures, if possible, as in *Temple* v. *Fraternal Bankers Reserve Ins.*, 179 Iowa 65, 161 N.W. 102. The clause was not strictly followed, or even put in issue at all and defendant did not claim that they had made a determination in their usual course of prcedure and determined not to issue a permanent policy, merely that the application contained false statements. (We point out later that there was no misrepresentations, that the agent kept the only copy of the application signed before the blank spaces were filled in, and filled in false answers after he learned of the death.)

Thus, even if the facts were as found by the opinion, they still violate the Erie rule, and it reversed the Trial court because he did not violate such rule.

B. The Court on its own motion passed on a point of Iowa law not assigned as an error, and did not follow any Iowa decisions therein, as follows:

At the time of delivering the printed contract the insurance agent wrote therein in ink the words "immediate coverage". The evidence of defendant also showed that there was printed upon the application, words to the effect that the premium was charged from the date of the application, not the date of the policy, and the vice president testified that if they had issued a policy to Hinkle the due date of the annual premiums would have been the date of the application, not the date of the policy (Record p. 49). The only error assigned or argued with regard to this writing, was that the agent had no authority to write it there, and that the entire receipt was merely an offer, and did not become a contract until accepted by issuing a policy. The written briefs of both parties concerning this writing were confined to the Iowa decisions as to the agent's authority under such circumstances. It was conceded by both parties that if this "receipt" was a contract at all, the question on appeal was whether under the Iowa decisions the agent had authority. The appellate court refused to use the Iowa cases cited by the parties because it held the words "immediate coverage" did not supersede the conditions that were printed, and thus it was unnecessary to pass upon the authority of the agent. If the court had read the Iowa cases cited in appellee's brief, it would have found that the Iowa Supreme Court considered that under the circumstances of charging a premium during the interval, such a promise does supersede the printed conditions, otherwise the Iowa court would not have taken the trouble to hold that the agent did have "apparent authority" in spite of an express restriction in his agency contract to the contrary—that on that point Iowa follows an estoppel doctrine.

The Iowa cases cited and ignored by the opinion are *Nertney* v. *National Fire Ins. Co.*, 199 Iowa 1358, 203 N.W. 826; *Boever* v. *Great American Ins. Co.*, 221 Iowa 566, 266 N.W. 276; *McDonald* v. *Equitable Life Ass. Soc.*, 185 Iowa 1008, 169 N.W. 352, and they show that the Iowa law is opposite to that held by the majority opinion. Could be that Iowa law implies one has insurance if he is charged for it.

The recital of what the Iowa law is without citing any authority, and a refusal to pass upon the Iowa decisions, violates the Erie rule, and also is not procedural due process.

C. To reverse an Iowa trial judge based on "weight of authority" violates the Erie rule.

On page A16 the opinion says the trial court erred because he took the position in a colloquy that good health and insurability are synonymous, and thus erred, and then the opinion discusses the split of authority on that point and decides it according to the "weight of authority", without any Iowa cases. We think the Court misunderstood the Record, and that the trial court held just the opposite of what the opinion understands, but if the trial court did so hold, the opinion violates the Erie rule, for there are no Iowa cases on that point at all, none were cited and none can be found. In a diversity case the Federal trial court is an Iowa forum, and if he held what they say he held, they violate the Erie rule when they say he erred, in the absence of a decision of a higher Iowa court.

II.

The Majority Opinion in This Eighth Circuit Is in Conflict with Opinions on the Same Subject in the Sixth Circuit, Liberty National Life Ins. Co., Inc., v. Hamilton, 237 F. 2d 235 (October, 1956), and with Opinions in the Second Circuit, Gaunt v. John Hancock Mutual Life Ins. Co., 160 F. 2d 599.

The Tennessee decisions involved in the Sixth, as to the insurance contract were more favorable to the insurance company than is the Iowa law; but the decisions of Iowa on the general principles of estoppel are the same as Tennessee. *Miller* v. *Lawlor,* 245 Iowa 1144, 66 S. W. 2d 267. Yet, where a Tennessee contract said in one sentence that no insurance was in force until the policy was issued, and said in another sentence words which one might take to mean that it was in force immediately, the Sixth Circuit applied the law of estoppel, and held that the company could not defeat that contract after insured died and it was too late for him to get other insurance. Yet, here the Eighth Circuit, a contract has written in ink "immediate coverage", and it contains no notice like the Tennessee one that a policy must be issued, and where one has every right to believe that if he is being charged premium during the interval of investigation, that he has the insurance that he is paying for—a much stronger case of estoppel than the Sixth Circuit, yet this Eighth Circuit ignores the Iowa law of estoppel, and relies on a case of a Utah contract that was so different that the case was not even in point.

The practical situation that exists throughout the whole United States that can be corrected only by certiorari herein is:

> "There is no way of getting any recent decisions on these insurance contracts on the applicable state

law because insurance companies are removing the trials to the Federal courts, who can only 'bathe the litigants in stale water' unless they can apply modern decisions on estoppel."

And then in the circuits we have conflicting decisions, as illustrated at bar, as follows:

"1. If plaintiff had sued in the Sixth Circuit, she would have lost in the trial court, and then got a directed verdict in her favor on the appeal;

2. But when she sued and the case could be removed to a court in the Eighth Circuit, she gets a verdict in her favor at the trial, and a directed verdict against her on appeal, plus a holding that the disputed evidence of defendant is conclusively true, and is thus deprived of a jury trial, as guaranteed under the 7th Amendment.

3. But if the case had remained in the Iowa courts she would have a directed verdict in her favor at the trial, no parol evidence would have been admitted to vary the delivered contract, Code, §511.34, would have been followed, and it would have been affirmed by the Iowa Supreme Court.

4. If the case had been in the Second Circuit plaintiff would have won, but on the ground of estoppel if Judge Clark had written the opinion, but on ground of strict compliance by the company with its own words, if some other judge wrote it."

Certiorari in this case is necessary to protect beneficiaries of such contracts, who are usually widows and orphans, who cannot afford the printing expense of long briefs and citations from everywhere as to the "weight of authority", when if we can get a uniform decision of the circuits, the insurance companies will not burden the Federal courts with removal, and the briefs will be short and

to the point on state decisions, and there will not be the hazard as to the forum, and the correct ruling for all the circuits is, that the law of estoppel is alike everywhere, and that when an insurance company allows a man to go to his death believing his wife and children are provided for, that they are thereafter estopped to claim otherwise, and more especially so, when they have charged him a premium over the interim so that if he lives and gets a policy he has to pay premium for the interim after it is conclusive that he did not need insurance during that period, but if it is determined during that period that he *did need* it, then the insurance company can prove he does not have it. Mere sense of equity dictates that the universal law of estoppel should apply after he is dead, and the Iowa court would have applied it in the Reynolds case but for the Iowa rule that estoppel must be pleaded. Plaintiff did plead estoppel here.

Federal courts should have a uniform holding that when an insurance company has set up a situation whereby it has the power to charge a man for interim insurance if he lives and gets a policy, but if he dies he does not have insurance, *i. e.*, if he does not need insurance he has to pay for it, but if he needs it he does not have it, is inequitable, and the courts will not assist in such a game as "heads I win, tails you lose". A practical situation, as illustrated herein: Usually the dealing is between the insurance agent and a man at the trial deceased. Such puts it in the power of the agent to testify to anything he chooses, and no one alive can contradict him. In this case it so happened that two witnesses did contradict him on all the details of what occurred in Hinkle's office.

At least the Federal courts should have a uniform rule, that when the other party to a transaction is dead, the testimony of the insurance agents is not conclusively true

even if it is not contradicted; and where as here, it was contradicted, the Federal courts should not do as the majority opinion did herein and hold the agent's testimony is conclusively true. Also, even if there were no statute like Iowa Code, Sec. 511.34, the fact the agent did not give insured a copy of his application opens the door to fraud too much, gives every insurance company absolute power to falsify applications, and thus to defeat a man whose lips have been sealed in death. The Federal rule should be that the failure of the insurance agent to deliver insured a copy of his application shows such a lack of good faith, as to make that agent's testimony, not conclusively true, as held herein, but always a jury question even when it is not contradicted by the circumstances.

III.

Court of Appeals Violated Plaintiff's Rights under 5th and 7th Amendments.

Compared with the record of the issues, grounds stated in the motion for directed verdict, and errors assigned and argued on appeal, the opinion in ordering a directed verdict for defendant, is a violation of plaintiff's right under the 5th Amendment to the U. S. Constitution to due process of law. It is not due process to try a law action *de novo* on appeal, and to hold the defendant's evidence conclusively showed something defendant never claimed in pleading, evidence, or errors argued, denies a jury trial, and is not the "course of the common law."

Also, when the trial court admitted evidence over plaintiff's objection in violation of the parol evidence rule, and of Iowa Code, Sec. 511.34, under a ruling that he would take care of it in his instructions, that part of the opinion that holds such evidence was conclusively true and orders a directed verdict for defendant thereon, violates plaintiff's

rights to due process of law under the aforesaid amendment.

The Court of Appeals denied plaintiff a jury trial as guaranteed to her by the 7th Amendment to the U. S. Constitution, by holding that evidence offered by defendant of a transaction with a man deceased at the time of the trial was conclusively true, and more especially so when defendant's witness was contradicted on all his details by two other witnesses, and when the physical appearance of defendant's exhibits contradicted defendant's witness, and where the facts testified to were contrary to human nature.

IV.

A Removal by a Corporation Does Not Fall Within the Judicial Power of the United States, and the Trial Court Erred in Overruling Plaintiff's Motion to Remand, As a Corporation Is Not a Citizen of Any State, and the Case Is Not "Between Citizens of Different States".

The platitude followed since 1844 has no basis in law when applied to *Removals*. Letson case does not permit *Removals*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

(1) Procedural due process of law—"* * * nor be deprived of * * * property without due process of law." 5th Amendment to the U. S. Constitution.

(2) "In suits at common law, * * * the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law." Amendment 7, U. S. Constitution.

(3) "The Judicial Power of the United States * * * shall extend * * * to controversies * * * between citizens of different states * * *" Article III, section 2, U. S. Constitution.

Iowa Code regulating life insurance companies in substance provides the company must attach to the policy "or of the contract of insurance" any application that "in any manner affects the validity." Iowa Code, Sec. 511.33.

Sec. 511.34, Iowa Code, provides in substance, neglect to comply with above section, the company "shall forever be precluded from pleading, alleging or proving such application or representations, or any part thereof, or the falsity thereof, or any part thereof, in an action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

STATEMENT OF THE CASE.

On February 25, 1955, defendant executed and delivered to Max Hinkle in Iowa a contract of life insurance, as follows:

CONDITIONAL RECEIPT

DO NOT DESTROY

Received Twenty One and 70/100 Dollars in connection with an Application made this day to the New England Mutual Life Insurance Company, of Boston, Massachusetts,

for Insurance of $10,500 on the life of W. Max Hinkle

Immediate Coverage

The Insurance applied for shall be in full force and effect from this date, provided the Proposed In-

sured is now in good health, notwithstanding any change in the Proposed Insured's health or condition due to disease hereafter acquired or to any subsequent casualty; and provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston; but if the Company determines that the Proposed Insured is not so insurable, said Application shall be declined and the amount paid will be refunded upon return of this receipt. If any check or draft given in payment of this premium is not paid on presentation, this receipt shall be of no effect. This receipt is not valid unless countersigned for the Company by a duly licensed agent.

Countersigned 2/25 1955

Philip C. Raye
Secretary

Rodney Bliss, Jr., General Agent

If you do not hear from the Company within sixty days, notify the Company at Boston, and upon request and return of this receipt the premium will be refunded.

At that time Hinkle signed an application form prepared by defendant, primarily in blank at the request of defendant's agent, who intended to fill out the blank spaces later. No copy of the application was delivered to Hinkle. The delivered contract was detached from the form, and was delivered as a complete contract in itself. At that time the "General Agent" of defendant wrote on the delivered contract in ink the words "immediate coverage," before delivering it. At the trial defendant produced the application and offered it in evidence over the objection of plaintiff that it violated the parol evidence rule and defendant was prohibited by Iowa Code, Sec. 511.34, from

making any use of it because no copy of it was delivered to insured. The court ruled that he would take care of it on the instructions (Record p. 32). There was dispute in the evidence thereafter as to whether the agent wrote false answers concerning Hinkle's pilot's license into the application after Hinkle died, or whether Hinkle told him false answers to the questions concerning being a pilot. A view of this application is important for plaintiff claims that it shows on its face that those false answers were written under different conditions than the other writing appears. It was not disputed that all handwriting on the application was that of Agent Bliss, except Hinkle's signature. Two witnesses who saw Bliss writing said Hinkle's desk was so crowded that Bliss wrote on a pull out board. Bliss denied this. We mention this dispute in testimony because the appellate court held the trial judge erred in not directing a verdict for defendant on all this disputed testimony. The jury could well have found that those false answers were put on that application after the agent learned of Hinkle's death. At the time defendant put this application in evidence it was still blank as to the essential information, such as "amount, plan, and rating applied for."

The above is important because the Court of Appeals based its opinion of reversal on the defeasance clause of the contract, which read as follows:

> "*but if the Company determines* that the Proposed Insured is not insurable,* (for the amount, plan, and rating applied for) said application shall be declined and the amount paid will be refunded upon return of this receipt".
>
> *(This part is taken by reference from the clause above it.)

and held the evidence conclusively showed Hinkle was not insurable for the "amount, plan, and rating applied

for", in the face of the application being absolutely blank as every one of these three things, and in spite of the fact the vice president of defendant testified that Hinkle was insurable for every plan they had and for any amount they had (Record p. 49). The first clause of the receipt said: "The insurance applied for shall be in full force from this date, provided, he is in good health", etc.

Going back now to the time of delivery of the "receipt", defendant's agent called its examining physician on Hinkle's phone, and the examination was set for the following Monday at 11:45 a.m. There is conflict in the evidence as to why this was. Mrs. Hanson, a stenographer who heard the conversation, testified that Bliss told Hinkle the doctor had said over the phone that he could not examine him until Monday, whereas Bliss testified Hinkle was the one who requested that the examination be set for Monday. Both courts held that the fact that it was set for Monday was the important thing, and it was not material who requested it, as by agreeing to it such condition was waived until Monday, and after that it was excused because of impossibility. This contract was made and dated on Friday, February 25, 1955. Hinkle was killed the next day.

It was the custom of Mr. Hinkle to fly his own airplane to Omaha, Nebraska, on Saturday mornings to give instruction in flying to the Iowa-Nebraska Air National Guard, of which he was an officer.

On Saturday, February 26, he got up before his wife did, got his own breakfast and left for the airport. When Mrs. Hinkle went to the kitchen for her breakfast she found this contract in suit on the kitchen table where her husband had put it as he left for the airport. This fact is important for it shows defendant led Hinkle, until after it was too late, to believe he had protected his wife and

children with insurance. It supports plaintiff's express pleading of estoppel. About 8 o'clock Saturday morning, after Mrs. Hinkle had found this "receipt" on the kitchen table, her neighbors came with the news that her husband had been killed.

About two weeks after Hinkle's death, the General Agent of defendant called Mrs. Hinkle and denied liability on the contract, on the ground that Hinkle had not had a physical examination. At no time since Hinkle died did defendant take any steps to exercise their power under the defeasance clause to avoid their contract.

After denying liability for an invalid reason, defendant's agent did write Mrs. Hinkle a letter on May 19, 1955, almost 4 months after Hinkle died, in which he enclosed the check, but the letter gave no reason for same in addition to what he had already told her on the phone. The defeasance clause required them to determine in their customary manner whether to issue a policy, then to return the premium on the ground that they had so determined, and to get the receipt back. They did none of these three requirements. We mention this because the appellate court held on page 16 of the opinion that defendant made a determination that Hinkle was not "so insurable". The fact was, defendant claimed the agent had never sent the application to the home office. All they ever did was to bluff the widow into a belief there was no contract. They never made a determination as required by the two Iowa decisions we cite, at the home office by the proper committee, and in the usual course of time for such determination.

Plaintiff's pleading was in the alternative, either as administratrix, or as beneficiary, and pleaded the contract as unconditional because of the words in ink, "immediate coverage", and if such did not supersede the con-

ditions, then sought recovery on it as a conditional contract. In its answer defendant failed to put performance of the condition of good health, in issue in that it did not comply with Federal Rule 9(c), which requires "A denial of performance or occurrence shall be made specifically and with particularity". Instead of complying with that rule defendant pleaded that it did not have knowledge as to his good health. However, the trial court submitted the question of health to the jury under an instruction that there was sufficient evidence of good health, that the jury should consider the circumstances, the presumptions, and the medical examination when his pilot's license was renewed, which was in evidence. No objections were taken by the defendant to any of the court's instructions to the jury. No motion for directed verdict was made by defendant at the close of plaintiff's evidence. At the close of all the evidence defendant made its first and only motion for directed verdict, on the grounds stated therein. It did not contain any ground concerning good health, and did not contain any ground to the effect that they had performed the defeasance clause. Their basic theory was that it was only an unaccepted offer, and they did not have to avoid it.

The answer of defendant pleaded as defenses: 1. that no contract ever existed because it was an offer that had never been accepted; 2. that they had never received the report of the medical examiner mentioned in the second proviso (Both courts held against them on this as it was the fault of this agent.); 3. that the agent had no authority to write on the receipt "immediate coverage"; 4. that defendant violated an Iowa statute by dating the contract prior to a physical; 5. that Hinkle misrepresented his pilot's license, etc., and was thus not insurable—no allegation that they had determined such fact in the time, manner

and by whom, as required in the Iowa decisions, *supra*. As to the defenses, that he was not insurable "for the amount, plan and rating applied for", the application was blank as to those three facts. The trial court held defendant had not established any of its defenses and that if Hinkle was in good health on the date of the application plaintiff was entitled to recover, and submitted that fact to the jury. No objection was taken to this and no error assigned on it. See Iowa decisions on, "mending his hold" *ante*.

To comply with Iowa procedure plaintiff pleaded facts which worked an estoppel on defendant as to defenses pleaded by defendant. This pleading is printed in Record pp. 24-28.

We mention this fact because the Iowa decisions concerning the apparent authority of the agent to waive conditions and promise immediate coverage, are based upon the fact they are charging premium over this interim, and the reasons stated in those opinions show that it is on the ground of estoppel; and what the Iowa decisions on "apparent authority" actually hold is that when the insurance company has the power to charge a premium for the interim, it is estopped from claiming there was no insurance during that period.

Defendant's evidence, including the application, shows conclusively that defendant would have dated the policy the date of the application (Record p. 49), and had printed on the application that the due date of the premium was the date of the "receipt", not the policy, that is, they charged premium over the interim.

The trial court got both parties to agree that Mrs. Hinkle should recover as beneficiary, rather than as administratrix, to simplify the instructions. The trial court

overruled defendant's motion directed verdict, and submitted the case to the jury under instructions. Defendant did not object to any of the instructions. The jury returned a verdict for plaintiff, and the court entered judgment thereon, which judgment is printed on Record p. 70. Thereafter defendant made Motion for Judgment Notwithstanding Verdict, on the ground of lack of sufficient evidence of good health of Hinkle. The court overruled this motion. There is no such motion in the Federal Rules, and if there were it lies to defects in pleading, not to defects in evidence, and is not "according to the course of the common law". See 7th Amendment.

Thereafter defendant appealed and argued specified grounds of error as to why his motion for directed verdict should have been sustained, none of which was that it had performed the defeasance clause. The Court of Appeals ordered a verdict directed for defendant on a ground not raised or argued. The dissenting opinion thought defendant was estopped under Iowa decisions to set up each and all defenses it claimed. The majority ignored the Iowa decisions. Plaintiff petitioned for rehearing, mentioning the above Iowa decisions, and other omissions, and asserted the opinion violated her rights under the 5th and 7th Amendments, and called attention to the fact plaintiff had pleaded and proved an estoppel under the Iowa decisions on estoppel on defenses claimed by defendant. Such petition was immediately denied.

BASIS OF FEDERAL JURISDICTION.

Plaintiff filed her petition in the Iowa state court of original jurisdiction. Defendant in due time removed the case from the state court to the Federal District Court, stating that plaintiff was a citizen of Iowa, and defendant was

incorporated in Massachusetts. Plaintiff filed Motion to Remand, in which she pleaded that defendant was not a citizen of Massachusetts, or any state, and that 11,000 shareholders of defendant were citizens of Iowa, the same state as plaintiff, and offered the certificate of the Insurance Commissioner of Iowa to prove it. The court ordered briefs filed on the subject. The court eventually overruled the Motion to Remand, and the ruling is in Appendix, p. A1. Defendant is estopped from claiming there is no Federal jurisdiction. Plaintiff does not want to claim it if the Court will reinstate the judgment of the District Court.

ARGUMENT.

The only defense seriously urged by defendant was that no contract ever existed because the "receipt" was an offer, and could only be accepted by the committee headed by Second Vice President Arnold; that such committee had never passed upon it (See Record pp. 46, 47). They used this witness, Arnold, to prove that the authorized committee had never passed upon Hinkle's insurability. Two weeks after Hinkle's death Bliss, General Agent for Iowa, called the beneficiary and told her they would not pay because Hinkle had not had a physical examination (Record p. 29). For four months, and until May 19, 1955, Bliss kept bluffing her into a belief there was no contract of insurance, and on such date mailed the premium check to her, stating no reason. If we believe defendant's witnesses, the agent never sent the application to the home office, but relied upon his skill in bluffing this little woman into believing there was no contract.

The insuring clause of the "receipt" was, "the insurance applied for shall be in effect from this date" provided

he is in good health; and the defeasance clause was, "but *if the company determines* that the proposed insured is not so insurable, said application shall be declined", etc. There was an intervening condition between the insuring and defeasance clauses "provided" the report of the medical examiner is received in the home office, etc. Both courts held this "proviso" (condition) was excused because defendant had prevented it from occurring by setting the medical examination for Monday.

Thus the gist of the case is, what does it take under the Iowa decisions for defendant to perform this defeasance clause and thus work a forfeiture of this contract? The trial court thought that under the Iowa decisions, and the evidence of Vice President Arnold, that the "determination" as to whether Hinkle was insurable, etc., had to be performed in the home office in Boston by the proper committee, and that under the Iowa rule of "mending his hold" the company had to do this before they had assigned some other excuse for not performing their contract. Such is the Iowa law as announced by decisions of the highest court of Iowa. *Farmers Milling Co.* v. *Ins. Co.*, 127 Iowa 314, 103 N. W. 207, and approved recently in *Craddock* v. *Life Assn.*, 225 Iowa 744, 285 N. W. 169. The appellate court reversed on this ground, and reached its conclusion as to what the Iowa law was by lengthy quotations from cases decided from almost everywhere, Missouri, Utah, Tenth Circuit, New York, and many others, which appear on pages A10, A11, A14, A15 of the majority opinion. They did mention the Reynolds case from Iowa, and then failed to follow it. They ignored completely the other Iowa decisions, and when reminded on Rehearing, refused to let it be decided by the full bench. They quoted from appellant's brief, which was 61 pages of citations and quotations, from decisions other than Iowa, try-

ing to prove what the "weight of authority" was. The correct Iowa law was quoted in Appellee's Brief, page 23, from the Reynolds case as follows:

> "but if the company, IN THE PROPER EXERCISE of its legal rights under the law and contract, which it is unnecessary for us to define in this opinion, REJECTS THE APPLICATION, *upon the ground that the applicant is not insurable*, and returns the premium paid, no liability can arise thereunder."

The reason it was unnecessary for the court to define what the proper method of passing on insurability in the Reynolds case was, that in that case there was no dispute but that the proper committee in the home office had followed the company's usual procedure in the proper course of time and in its regular order, and had determined that that applicant was not insurable, but before they had made their final decision they learned of applicant's death from heart disease, which they had already determined from independent rating agencies he had. There was no question there but that they had followed their usual procedure of passing on applications. There was no pleading or other claim of estoppel in that case, and the court did not pass upon any law of estoppel. The Iowa court merely held that the company could continue and complete their usual procedure they had started before his death, and make the final determination even after his death. But the Eighth Circuit holds herein, that because of the other non-Iowa cases cited and quoted from by the majority opinion, this defendant did not have to follow the procedure called for in the Reynolds opinion. And it also refused to follow the additional Iowa decision of *Farmers Milling Co.* v. *Ins. Co., supra*, which holds that an insurance company cannot avoid a contract by performing the terms of the defeasance clause after it has previously given some

other excuse for not performing it, *i. e.*, the Iowa doctrine of "mending his hold". This *Farmers'* case, *supra*, further holds that the secretary of the company is not the proper one to perform the defeasance clause, but it must be passed upon in the usual course by the board of directors, or whatever functionary is provided by the by-laws, which in the case at bar would be the committee at the home office that passes on applications, as testified to by the vice president on page 47 of the Record.

Another reason pleaded by defendant that there was no contract was, defendant claimed it violated an Iowa statute for the regulation of insurance companies that said in effect that no insurance company should issue a policy for over $10,000 that did not contemplate a physical examination. The trial court ignored this defense for three reasons: (1) the statute did not make the contract void, (2) this contract was not a violation of the statute, and if it were, (3) defendant could not claim the benefit of its own wrong. The appellate court thought it was unnecessary to pass upon this statute because they were reversing anyway, but in so doing indicated it would not follow the Iowa decisions on estoppel. Plaintiff had pleaded at length the facts of estoppel on this point and had argued fully that by printing these contracts for use in Iowa defendant either interpreted the statute to permit what defendant was doing, or had willfully violated it, that they had misled Hinkle, and could not claim the benefit of defendant's own wrong, which the majority impliedly indicates it will do. We cannot afford this certiorari, to say nothing of a second one.

On page A18, the majority opinion says, "There was no time for investigation prior to the applicant's death." Defendant knew when it printed these contract forms such might be the case of any applicant. Insurance companies

dictate their own contracts, and under Iowa decisions they must follow them the way they print them, and follow them strictly. By the part of the opinion quoted above, the majority refused to follow other Iowa decisions to the effect that such contracts are to be followed strictly the way the insurance companies draft them, and that every intendment is against a forfeiture, as represented by *Temple* v. *Fraternal Bankers Reserve*, 179 Iowa 65, 161 N. W. 102. However that may be, there was plenty of time after Hinkle's death before they assigned some other reason, to perform strictly the defeasance clause, if the Reynolds case is liberally construed. If instead of bluffing the little woman with some other excuse the company had taken the position that this "receipt" was a contract, instead of claiming it was only an unaccepted offer, and had proceeded to comply literally with the defeasance clause, it might have avoided the contract under the rule in the Reynolds case. But surely one is not avoiding a contract when he puts in his time insisting that it is merely an offer. The defendant's Answer is incompatible with the above expression of the majority opinion.

While it is true under the present rules of civil procedure, both Iowa and Federal, a defendant may plead inconsistent defenses, it seems not due process of law for an appellate court to hold "evidence conclusively shows * * * defendant made a good faith determination that he was not insurable," when defendant failed to plead or prove that he made such determination when he was permitted to so plead, and when his pleading and proof was directed to the point that no such determination was required because no contract had ever come into existence.

I.

Violation of Erie Rule.

We submit, the Court of Appeals violated the Erie rule when it went outside of Iowa for its quotations, and failed to follow the three Iowa decisions we cite herein, contained in 187 Iowa, Reynolds; 127 Iowa, Farmers Mill. Co.; and 179 Iowa, Temple case, and that the trial court was correct when he did follow them, and that it was error to reverse the trial court, and the majority opinion was not "the course of the common law."

B. The majority opinion's view of the effect of the words "immediate coverage" written in ink by the insurance agent, falls also under the Erie rule, which we have sufficiently pointed out under Questions Presented. If they had read the Iowa cases we cited, they would have found that there is an element of estoppel, which the Iowa court calls apparent authority, that is binding on a Federal court in a diversity case, or that by charging a premium over the interim, they have impliedly promised the man that he has what he is paying for.

C. The trial court in a colloquy with defendant's attorney made some remarks in the absence of the jury which the Court of Appeals holds was error. We have adequately presented that in our Questions Presented, *ante*. The majority opinion violates the Erie rule on this also. The matter had no bearing on the outcome of the law suit.

II.

The Majority Opinion Is in Conflict with Opinions in the Sixth and Second Circuits, and the Federal Cases Cited, Ante.

In the case that came up from Tennessee in the Sixth, the insuring clause at one place said the insurance was

not effective until a policy was issued, but at another it could have been construed to lead the applicant to believe it was effective at once. In the receipt at bar there was no mention that it was not effective until a policy was issued, but the insuring clause states it is, "effective as of this date," etc. Charging a premium during the interim would lead Hinkle to believe he was getting what he paid for. If Hinkle believed he was in good health, he had a right to believe he had immediate insurance, whereas in the Tennessee contract the insured had some notice that maybe he did not have insurance until he got a policy. But the Sixth Circuit held that even with this notice, the insurance company was liable unless they notified him before his death that he was not insurable. That means that if he went to his death believing he had insurance, they are estopped to claim otherwise after it is too late for him to protect himself. They held the insurance company to a strict compliance with the contract the way they printed it.

The Iowa cases on estoppel are the same or stronger than those of Tennessee, although there are no Iowa cases on all fours with this receipt that mention estoppel. But the general law of estoppel is, if you cause a man to believe or rely on any fact until it is too late for him to protect himself, you are estopped from claiming that such fact does not exist. An extreme example of how far Iowa uses estoppel in its decisions is *Miller* v. *Lawlor*, 245 Iowa 1144, 66 N. W. 2d 267, decided in 1954. The dissenting opinion, as well as plaintiff's pleadings shown from pages 23 to 28 of the printed Record, called attention to estoppel; but the majority opinion refused to apply that part of the Iowa decision, as the Sixth Circuit did.

It is no answer to the above that the Reynolds case did not mention estoppel. No estoppel was pleaded there,

as it was here, and the Iowa law is that estoppel is not available unless it is put in issue by the pleadings. Under the general decisions as to estoppel in Iowa, perhaps if that had been raised by the pleading in Reynolds the court would have held insured was misled. The dissenting opinion herein held the same as the Sixth Circuit. We submit that the majority opinion has refused to follow the Iowa decisions on estoppel, since estoppel was pleaded by this plaintiff as to each defense pleaded by defendant.

We further submit that under present conditions, unless the situation throughout the United States is corrected by certiorari herein, whether one can recover on these interim contracts depends upon which Circuit the appeal falls in, the details of which are pointed out in our statement of the Questions Presented, *ante*. Justice should be certain and uniform in the Federal courts, and not depend on mere chance of the tribunal.

III.

Violates Plaintiffs' Rights under 5th and 7th Amendments.

The appellate court held the trial court was in error (Opinion, p. A17) for not sustaining defendant's motion for a directed verdict on a ground that was not mentioned in the motion, not assigned as error on appeal, and the opposite fact was claimed and proved by defendant's evidence, namely that defendant had determined Hinkle was not insurable. The error assigned was, the court erred in not sustaining motion for directed verdict on four stated reasons. Their motion never claimed they had determined he was not insurable, as required by the last proviso of the contract; their pleadings never claimed it, and their evidence refuted it (Record, p. 48). Their only serious defense was that it was only an offer until they accepted it,

and that their committee had never passed on it, and thus no acceptance. In a law action, when the appeals court goes beyond the errors assigned and reverses a trial court on a matter that was never raised or claimed, such is not due process of law. The constitutional question was raised in petition for rehearing, and denied.

Thus on page A18, the majority opinion states that the evidence conclusively shows defendant made a good faith determination that because of his aviation record Hinkle was not insurable for the rate, etc., applied for, and on page A18 says the delay in the "investigation was not prejudicial to plaintiff", in the face of defendant's own evidence and pleading that the "receipt" was not a contract because never accepted and the company had never received it at its home office (Record, p. 47): The Iowa decisions cited herein hold such does constitute prejudice to any plaintiff, that commencing suit based on one excuse for non-performance and thus jeopardy of costs, is such prejudice to plaintiff as to preclude determination by a defendant of a different excuse after suit is commenced. Prejudice, however, is not necessary because making a good faith determination in the regular channels was the only way defendant could escape the terms they had themselves dictated. The quoted part of the opinion above violates the Iowa law as announced in *Reynolds, supra,* and other Iowa cases, *supra,* and in addition passes on a ground for directed verdict not mentioned in the Motion for Directed Verdict. The Motion, Paragraph 9, makes no claim of determining insurability, but only that "he was not insurable under defendant's underwriting rules". To go outside the grounds stated in the motion and hold a trial court erred in not sustaining the motion on some ground not mentioned therein, is not due process of law. A trial court does not err, if none of the grounds stated in the

motion are grounds to sustain it, when he overrules it. And it is not due process of law for the appellate court to try a different law suit than the one presented.

The nearest the motion got to the ground of reversal is paragraph 3 thereof, which says "this provision requires a determination by the company of insurability, and negatives a construction of the receipt as being a contract of temporary insurance". The court had on page A11 mentioned the Reynolds case, and had held that under that case the receipt *was* a contract, and was not ambiguous. So all paragraph 3 amounted to, was a contention that there was no contract or that it was ambiguous.

There was nothing in the motion to justify the last quoted part of the opinion, and if the court had in mind paragraph 3 of the motion, the Reynolds case in Iowa had determined that point against defendant. Thus either the court abandoned the rule in the Iowa cases, or it sustained the Motion on some ground not stated therein. If it is the first, it violated the Erie Rule, if it is the second, it is not due process of law. Also on page A14 the opinion states the trial court erred because it took the position good health and insurability were synonymous, in a colloquy with defendant's attorney. The only error assigned was he should have directed a verdict for four named reasons and this colloquy was not assigned as one of them. It is not due process for the appellate court to pass on errors not assigned and which were not raised by the motion that the trial court overruled, and that had no bearing upon the outcome of the law suit.

The trial court admitted in evidence over plaintiffs' objection the application defendant produced. It was still primarily blank, although Hinkle's signature appeared upon it. No copy had been delivered to Hinkle, and the

Iowa Code prohibits the use for any purpose of such an application by an insurance company. The purpose was to prove Hinkle misrepresented his airplane and pilot's activities. By the Iowa case cited above, such is immaterial unless the company *determines* that the applicant is for such reason not insurable before it gives some other reason for not performing the contract, so the trial court later treated it as immaterial. Plaintiff proved, however, by two witnesses who were in the room at the time the application was taken by Bliss, circumstances which would at least leave a jury question that Bliss wrote those false answers into the application after he learned that Hinkle had been killed. The opinion holds Bliss's testimony is conclusively true. This denies plaintiff a jury trial on an issue of fact. The circumstances so completely refuted Bliss's testimony as to make it unreasonable.

Passing on matters as stated above not claimed in the pleadings or in the errors assigned, and holding disputed evidence "conclusively" true in a law action on appeal, is not due process, and is not "by the course of the common law", and denies a jury trial.

The opinion refused to pass on two matters argued with the inference in each that the trial court erred as to them: (1) As to whether appellant could raise for the first time after trial a question as to sufficiency of evidence that Hinkle was in good health. The court instructed the jury that there was sufficient evidence of good health. No objection was made to the instruction. Defendant's motion for directed verdict did not mention insufficiency of health evidence as a ground. Defendant's answer did not put the question of health in issue, and it did not deny plaintiff's allegation of good health, but stated merely that defendant had no knowledge of such fact. Rule 9 requires a defendant in denying a condition to have such knowledge

and to plead it specifically and "with particularity". To infer the trial court erred on a matter not in issue is not due process.

(2) The opinion infers that if it were necessary the appellate court would hold that defendant could use as a defense the fact that it deliberately violated an Iowa statute, and that issuing this contract in Iowa might be a violation, although there are no Iowa cases so holding. The Iowa law is plain that one can not claim the benefit of his own wrong, if there were any wrong. The trial court determined that and no objection was made to his instructions.

We mention all of the above because it shows the attitude of the two writers of the majority opinion, which together with their refusal to let the rehearing petition go before the full bench, shows on its face that plaintiff was deprived of her judgment without due process, and that the majority procedure was not by the course of the common law, as required by the 7th Amendment.

IV.

No Federal Jurisdiction in Foreign Corporation Removal Cases.

Any act of Congress allowing removal by a corporation of any case because it could have been *commenced* by the plaintiff in a Federal court is void as an attempt to expand the Judicial Power of the United States beyond that fixed by the Constitution.

Ever since 1844 there has existed a platitude that a foreign corporation could remove a case against a citizen of the state who elected to commence it in a state court. This platitude is based on an erroneous application of what was held in *Louisville C. & R. Co.* v. *Letson*, 2 How. 497. The reason the court gave therein precludes *removal* by a

corporation, rather than sustains removal. A natural person had sued a foreign corporation in a Federal court, and the corporation tried to defeat that right of the plaintiff to choose a Federal court. The Supreme Court held that although it was not a citizen of any state, and thus no diversity, a corporation could not plead its artificiality or lack of citizenship to defeat the right of a natural citizen to elect his tribunal. To do so would give a non-citizen an advantage over a citizen, and thus indulge the fiction that all its stockholders were citizens of the state of its incorporation—a type of estoppel. To apply that same fiction to the opposite situation where the plaintiff had elected the *state* court as her tribunal and to permit the corporation to remove the case to a court of *its* choosing, violates the very thing the court was trying to prevent; it enables the corporation to take advantage of its artificiality and non-citizenship to defeat the rights of the natural person to elect to use the *state* courts. We find no decisions since 1844 passing upon the point we raise here. Since that time, however, it has been decided that a conclusive presumption is not due process; fictions have been said to be "an unconstitutional assumption which no lapse of time should make us hesitate to correct"; 139 F. 2d 1003; the reasoning is "examples of Marshall's time that are not sound under modern conditions", 337 U. S. 618; and is analyzed and refuted in 26 Harvard L. R. 853, 683, 885.

It would be a travesty on justice if this little woman would have to pay all this printing bill, unnecessarily large because appellant and the majority opinion wish to discuss the "weight of authority", and then get no result for these terrific costs, because defendant has tried to wear her out in a court that has no removal jurisdiction, so we do not push this too much, but we do not wish to defeat the right of the Federal government to protect itself from needless

work on cases over which it has no jurisdiction, nor to protect other widows and orphans from being defeated of their rights to have their litigation decided in the state courts where they will have to print arguments on state law only.

At the outset of the Record we signed a stipulation prepared by opposing counsel that there was Federal jurisdiction, to make unnecessary printing the record of this remand motion. We do not wish to violate that agreement; but we do not wish to preclude the court from protecting itself, nor do we wish to do what Congress has no power to do, and confer jurisdiction beyond that fixed by the Constitution.

If we are wrong about the Iowa decisions pointed out herein, then the case should be remanded with direction to sustain the motion to remand to the state court, at *defendant's costs* for causing all this Federal printing; but if we are right as to the Iowa decisions, we trust the court will find a way to give us the fruits of our labors, and order the Court of Appeals to affirm the judgment of the District Court. If there is Federal jurisdiction, uniformity requires that all Circuits follow the Sixth, and be required to apply the ordinary law of estoppel of the state involved, as advocated by the dissenting opinion herein.

We submit, that under the Iowa decisions cited herein, the trial court followed the Iowa decisions, the Court of Appeals reversed on an error not raised, and not in conformity with Iowa decisions, denied plaintiff's right to a jury trial, violated procedural due process of law, and this Court should order the Court of Appeals to affirm the judgment of the District Court.

Respectfully submitted,

LELAND S. FORREST,
Attorney for Petitioners.

United States District Court

SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION.

Filed March 3, 1956.

Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle,
Plaintiffs,

vs.

New England Mutual Life Insurand Company, of Boston, Massachusetts,
Defendant.

Civil No. 3-659.

Order.

Upon consideration of plaintiffs' motion for remand of this action to the District Court of Iowa in and for Polk County, on the ground of lack of requisite diversity of citizenship between the parties hereto, and as stated in the court's memorandum filed herewith;

It is Ordered that plaintiffs' motion for remand be and the same is hereby overruled and denied.

Signed at Des Moines, Iowa, this 3rd day of March, 1956.

/s/ Roy W. Harper,
United States District Judge
By Assignment.

Judgment of the District Court.

Appears in full in Record pages 70 to 72.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 15,740

New England Mutual Life Insurance Company of Boston, Massachusetts,

Appellant,

v.

Maxine K. Hinkle, Administratrix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle,

Appellees.

} Appeal from the United States District Court for the Southern District of Iowa.

[November 5, 1957.]

Phineas M. Henry (Ralph A. Church and Luther L. Hill, Jr., were with him on the brief) for Appellant.

Leland S. Forrest for Appellees.

Before SANBORN, WOODROUGH, and VAN OOSTERHOUT, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Defendant insurance company has appealed from a judgment entered against it upon an alleged contract of

temporary life insurance. Jurisdiction based upon diversity of citienship is established.

Rodney Bliss, Jr., general agent of the defendant, learned that W. Max Hinkle had made a mortgage upon his home. Hinkle was service and parts manager for the Onthank Company. Bliss, on February 25, 1955, called upon Hinkle at Hinkle's place of employment to sell him insurance. Defendant's decreasing term policy was fully explained to Hinkle. The policy discussed afforded initial insurance coverage of $10,500 with coverage declining at the rate of $500 per year. Hinkle signed a written application for such a policy at standard rates and paid by check the initial quarterly premium. Thereupon, he was given a conditional receipt reading as follows:

"CONDITIONAL RECEIPT. DO NOT DESTROY.

Received Twenty-one and 70/100 Dollars in connection with an Application made this day to the New England Mutual Life Insurance Company, of Boston, Massachusetts, for Insurance of $10,500 on the life of W. Max Hinkle.

Immediate Coverage

"The insurance applied for shall be in full force and effect from this date, provided the Proposed Insured is now in good health, notwithstanding any change in the Proposed Insured's health or condition due to disease hereafter acquired or to any subsequent casualty; and provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is received at the Home Office of the Company in Boston; but if the Company determines that the Proposed Insured is not so insurable, said Application shall be declined and the amount paid will be refunded upon return of this receipt. If any check or draft given in payment of this premium is not paid on presentation, this receipt

shall be of no effect. This receipt is not valid unless countersigned for the Company by a duly licensed agent.

Philip C. Raye, *Secretary.*

Countersigned 2-25, 1955.

Rodney Bliss, Jr., General Agent.

If you do not hear from the Company within sixty days, notify the Company at Boston, and upon request and return of this receipt, the premium will be refunded."

The above receipt is upon a regularly printed form of defendant. The name of the proposed insured, the amount of insurance, the premium, and the date were filled in by Bliss. Bliss also wrote in the words "Immediate Coverage" appearing in the receipt. He signed the receipt as general agent and delivered it to Hinkle.

It was understood between Bliss and Hinkle that Hinkle was to submit to a medical examination by the company's medical examiner. An appointment for such medical examination was made for February 28, 1955. There is a conflict in evidence whether the medical examination was deferred to February 28 to suit Hinkle's convenience or that of the company's doctor. Hinkle was killed on February 26, 1955, when the plane which he was operating crashed near Des Moines.

Plaintiff, Maxine K. Hinkle, widow of insured, brought this action individually, as beneficiary, and as administratrix of Hinkle's estate, alleging that defendant had assumed insurance coverage upon Hinkle because of the words "immediate coverage" written in the receipt by the agent, Bliss; and that, if such is not the situation, there is a conditional liabilty on the part of the insurer, and that all the conditions had been performed or excused or pre-

vented from occurring by the defendant. The court submitted to the jury only the claim asserted by the plaintiff individually as beneficiary. Mrs. Hinkle was designated as beneficiary in the application and was entitled to recover if at all as beneficiary.

Defendant at the close of the evidence made a motion for directed verdict which was overruled. The motion is set out in a footnote.[1] The jury found for the plaintiff

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[1]Motion for Directed Verdict.

Now then at the close of the evidence the defendant moves the court to direct the jury to return a verdict for the defendant on Count IV of the petition on the following grounds:

1. The conditional receipt offered in evidence, and alleged to be a contract of insurance is not a contract, but a receipt delivered to evidence the payment of a first premium in connection with an application for life insurance, and the terms upon which the first premium was paid. It was merely a part of a transaction which constituted an application for life insurance. Said application was not completed and was not accepted by the defendant, and there was no meeting of the minds of the parties to form a contract.

2. The said conditional receipt was conditioned upon the receipt of satisfactory evidence at the home office in Boston that the proposed insured was insurable for the amount, plan and rating applied for. It appears from the record that no such evidence was sent to the home office of the defendant at Boston or received by it there, and in fact, no such evidence could have been furnished by the proposed insured in view of his aviation record.

3. The conditional receipt contemplated and expressly provided in the third clause of the printed matter therein "If the company determines that the proposed insured is not so insurable, said application shall be declined and the amount paid will be refunded upon return of this receipt." This provision requires and contemplates a determination by the company as to the insurability of the proposed insured for the amount, plan and rating applied for, and, provided that, if the company determines that the proposed insured is not so insurable, the application will be declined: that this provision negatives the construction of the receipt as being in itself a contract for temporary insurance.

4. The insertion of the words "immediate coverage" below the amount of insurance applied for in the conditional receipt does not convert the receipt into a contract of temporary insurance in view of the fact that a decreasing term policy was applied for,

and judgment for plaintiff was entered. Defendant filed a timely motion for judgment n.o.v., restating the grounds urged in his motion for directed verdict and adding a new ground as follows:

> "The defendant also moves the court for judgment in its favor notwithstanding the verdict on the ground that there was no evidence in the record to support a verdict for the plaintiff on the issue of fact submitted to the jury by the court, namely the good health of W. Max Hinkle on February 25, 1955, and that on that issue alone a verdict should have been directed for the defendant."

This appeal is based upon defendant's contention that the court erred in overruling its motions for directed verdict

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and the proposed insured was advised that the amount of insurance in the first year was $10,500, and would decrease annually thereafter.

5. If said receipt is construed to be a contract of insurance because of the addition of the words "immediate coverage" under the amount of insurance applied for, said contract is not binding on the defendant because the agent, Bliss, had no authority to make, alter or discharge any policies, contracts or agreements on behalf of or in the name of the company, or, to waive any forfeitures, or, except as otherwise agreed to in writing by a duly authorized officer of the company, to incur any obligations or liability for which the company should be responsible.

6. If said receipt is construed to be a contract of insurance, it is not a valid contract under the laws of Iowa because the defendant was prohibited by the statutes of Iowa from issuing contracts of insurance in an amount more than $10,000 without a medical examination duly passed and approved by the medical examiner or the medical board of the company. Section 508.28 of the Code of Iowa, 1954, requires or contains this language: "The Commissioner of Insurance shall decline to approve any form of policy unless insurance is based upon the satisfactory medical examination of applicant by a physician, and no policy or contract shall be issued by any insurance company to any individual until such examination has been passed and duly approved by the medical examiner or the medical board of the company." And then in a subsequent section there is a provision that non-medical insurance may be issued up to $10,000.

7. It appears from the record that there was no medical examination because of failure of the proposed insured to have an

and for judgment n.o.v. Defendant contends that it is entitled to judgment for the reasons stated in the motions.

It appears to us that the vital question involved in this appeal is the construction to be given to the conditional receipt heretofore set out. The execution and delivery of the application, the payment of the premium, and the issuance of the receipt all occurred in Iowa. We agree with the parties that Iowa law controls.

One of the leading cases in the field of temporary life insurance is *Reynolds* v. *Northwestern Mutual Life Ins. Co.*, 189 Iowa 76, 176 N.W. 207. In that case the Iowa court had occasion to consider a conditional receipt very similar to the one now before us. There, as in our present case, the first premium had been paid. In the *Reynolds* case the condition was "provided the said company in its judgment shall be satisfied as to my insurability, on the plan applied for, on the date of such medical examination." Here, the material condition is, "provided that satisfactory evidence that the Proposed Insured is now insurable for the amount, plan and rating applied for is

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examination. Therefore, he failed to furnish an application upon which the defendant, under the law of Iowa, could insure his life for $10,500.

8. It appears from the evidence that the proposed insured was informed that a medical examination was necessary in connection with his application for life insurance. His failure to take said medical examination, as shown by the record, was not due to any act or neglect on the part of defendant, and there is no evidence that said medical examination was waived by the defendant.

9. It appears from the evidence that because of the proposed insured's aviation record, he was not insurable for the plan and rating applied for under the defendant's underwriting rules and practices. Regardless of whether the answer to Question 17 (a) in the application was written by the agent before or after the proposed insured signed the application, if he had answered "yes" to said question he was not insurable for the plan and rating applied for.

received at the Home Office of the Company in Boston." The Iowa court in *Reynolds* recognized that preliminary contracts of insurance are valid and enforceable. The court then states that the contract must be construed as a whole, and effect must be given to the condition relating to insurability. The court says (p. 209):

> "* * * The insurability of the applicant on the date of the medical examination is, by the contract made the test of the company's liability."

The court construes the contract as a whole as follows (p. 209):

> "* * * Unless the application is in the proper exercise of the company's rights, under the law and the contract, rejected, and the insurance refused, the preliminary contract provides protection from the date of the medical examination, and if death results from some cause arising after the date of such examination, the company is liable upon the contract, according to its terms; but if the company, in the proper exercise of its legal rights, under the law and the contract, which it is unnecessary for us to define in this opinion, rejects the application upon the ground that the applicant is not insurable and returns the premium paid, no liability can arise thereunder."

In the *Reynolds* case the applicant died before the completion of the investigation as to his health. The insurer, after applicant's death, rejected the application upon the ground that the applicant was not an insurable risk on the date of the medical examination. The Supreme Court of Iowa determined that the trial court had properly found as a matter of law that the insurer had in good faith rejected the application on the ground that the applicant was not insurable for the policy applied for, stating (p. 210):

"* * * The record, we think leaves no doubt that he was not entitled to insurance and that no liability existed upon the contract. The fact that the company did not, prior to his death, know that deceased had been for several months afflicted with heart trouble, should not be given controlling importance. It goes to the question of his insurability. * * *"

That the subject of temporary life insurance pending approval of application or issuance of policy has caused the courts considerable difficulty is demonstrated by an exhaustive note in 2 A.L.R. 2d 943. The wording of the binders or conditional receipts involved in the decided cases varies considerably. The author of the cited annotation, at p. 960, classifies the types of contracts of temporary insurance in general use as follows:

"(1) The first type of contract, around which most of the existing conflict centers, usually provides that any insurance shall, by reason of the payment of a premium at the time of the application, be in force from the date of the application (or of the medical examination), provided the application shall be approved and accepted, as applied for, at the home office of the insurance company.

"(2) Another type of receipt provides that the insurance shall be effective as of the date of the medical examination, if the company shall be satisfied that on that date the applicant was an insurable risk and that the application was otherwise acceptable under the company's regulations for the amount and plan of the policy applied for. In some instances the date of the application is taken instead of the date of the medical examination.

"(3) In a third type of receipt the provision is that the insurance shall be in force as of the date of the application or the medical examination if the company at its home office shall issue the policy on the

plan applied for. In some instances delivery of the policy is required.

"(4) The fourth type of receipt is represented by the unconditional provision that the insurance shall take effect as of the date of the approval of the application by the insurer."

The conditional receipt we are considering would appear to be of the class described in paragraph 2. The variance is that in our present case the effective date of the insurance is made the date of the receipt rather than the date of the medical examination. The annotator, at page 987, cites authorities upholding the validity of a condition of insurability, among them *Reynolds* v. *Northwestern Mutual Life Ins. Co., supra; Warren* v. *New York Life Ins. Co.*, 5 Cir., 128 F.2d 671; *Gonsoulin* v. *Equitable Life Assurance Society*, 152 La. 865, 94 So. 424; *Equitable Life Assurance Society* v. *Robertson*, Mo. App., 191 S.W. 989.

The application and conditional receipt in *Mofrad* v. *New York Life Ins. Co.*, 10 Cir., 206 F.2d 491, are of the same general type we are here considering. In that case a directed verdict for the insurer was affirmed upon the basis that the insurance was not in force because the applicant had not met the insurability test. The court upon the issue of construction states (pp. 493, 494):

"* * * 'A contract of insurance rests upon and is controlled by the same principles of law applicable to any other contract. What the contracting parties intended, mutually agreed to, and their minds met upon, is the measure of their obligations.' * * * And if the intentions of the parties are clear from an examination of the contractual documents, this court will not rewrite the contract. * * *"

"The application for the policy provided that the insurance policy should be dated as of the date of the

> application. 'It was within the rights of, and was competent for, the parties to provide in the application under what conditions and at what time the policy should become effective and binding.' *Jones* v. *New York Life Ins. Co.*, 1927, 69 Utah 172, 293 Pac. 200, 202. The provisions in the application agreement do not fix the effective date of the insurance contract. They simply impose conditions precedent to the taking effect of the insurance coverage. *Shira* v. *New York Life Ins. Co.*, 10 Cir., 1937, 90 F.2d 953. When read together, they mean that the insurance coverage shall take effect only in the event the conditions precedent specified in the application are fulfilled, and then only as of the date of the application. * * *"

As pointed out by Judge Clark in his concurring opinion in *Gaunt* v. *John Hancock Mutual Life Ins. Co.*, 2 Cir., 160 F.2d 599, 603, the insurability condition is much fairer to the insured than the approval condition. Under the approval condition absolute power remains in the insurer to reject the risk. Under the insurability condition the risk can be rejected only in the event a good faith determination is made of lack of insurability as of the time the temporary insurance was to become effective.

The effect of the words "Immediate Coverage" written into the receipt by the agent must be considered. Under the *Reynolds* case, *supra*, a receipt such as the one we are considering provides immediate coverage, subject to the provisos setting out the circumstances under which the insurance would not be in effect. Unless the words "Immediate Coverage" were intended to eliminate the conditions agreed upon, the addition of the words does not change the meaning of the contract. We observe that the receipt is labeled "CONDITIONAL RECEIPT" in large letters. The conditions are plainly stated in the receipt. The conditions were not eliminated from the receipt, nor were they expressly waived. The conditions remained a

part of the receipt as delivered. We do not believe that it can fairly be said that the addition of the words "Immediate Coverage" was intended to eliminate the conditions. Under such a construction of the contract as a whole, we do not reach the serious question of the authority of the agent, Bliss, to alter the receipt or to agree to immediate unconditional coverage.

From our consideration of the authorities heretofore cited, we believe that the Iowa court would not find the conditional receipt before us ambiguous, and would construe it as providing insurance from the date of the receipt, subject to the condition that if the insurer rejects the application in good faith for valid reasons upon the ground that the applicant is not insurable for the amount, rating, and plan applied for, and the premium is returned, no liability will exist even if death occurs before notice of rejection. The check given for the premium was never cashed. It was returned to the beneficiary and later sent to the defendant by plaintiff's attorney. The insurer has tendered its return.

Defendant contended in its motions in the trial and contends here that there could be no valid temporary insurance, relying upon language in the *Reynolds*, case, *supra*, relating to insurability upon the date of the medical examination. In the *Reynolds* and some of the other cases relied upon by defendant the conditional receipt called for insurability on the date of the medical examination. In our present case the receipt provides that the insurance applied for shall be in effect from this date (obviously meaning the date of the receipt), subject of course to the provisos. There is nothing in Part I of the application inconsistent with the receipt. The application provides that if the premium is paid with the application "the insurance shall take effect as stipulated in the Conditional Re-

ceipt." The conditional receipt on the basis of the words it contains can not fairly be construed to add the medical examination as an additional condition precedent. Whether by implication of law such a condition is to be read into such receipt because of section 508.28 of the Code of Iowa, 1954, prohibiting the issuance of a policy of life insurance for more than $10,000 until a satisfactory medical examination shall have been passed and approved by the medical examiner or medical board of a life insurance company, raises an unsettled question of Iowa law upon which we deem it unnecessary and, hence, inadvisable to express an opinion.

It was contemplated by the parties that the proposed insured submit to medical examination. By mutual agreement such examination was deferred until February 28, 1955. At the time of the application no one anticipated the proposed insured's untimely death. The fact dispute as to who requested the postponement of the medical examination has no bearing upon the result we reach.

The conditional receipt we are considering contains two provisos, the first pertaining to good health and the second to insurability. The trial court submitted the issue of the good health of the applicant at the time of the application to the jury, and in effect told the jury that if they found for the plaintiff on this issue, the verdict should be for her. The jury found for the plaintiff.

There is serious doubt whether the question of the sufficiency of the evidence to sustain the jury's verdict upon the good health issue is properly before us for review. Since we consider our determination upon the insurability issue, hereinafter discussed, decisive of this case, we shall assume without deciding that there was enough evidence to make the issue of good health, standing alone, one of

fact for the jury, and that the jury's finding that the applicant was in good health is binding upon us.

This leaves for consideration the condition as to insurability. The trial court took the position that good health and insurability are practically synonymous. In so doing the trial court erred. While there are some authorities to support such position, the weight of authority and the better rule are contrary. Good health is an element of insurability, but is only one of many elements to consider upon the issue of insurability. The authorities on the meaning of insurability are ably discussed in *Kirby* v. *Prudential Insurance Company of America*, Mo. App., 191 S.W.2d 379, 162 A.L.R. 660. The court concludes:

> "We cannot say that the term insurability is ambiguous and is susceptible of two different interpretations, one of which is 'good health.' It is not thought that the man on the street would so construe the term. Probably most people know that to be insurable one must have good health; but they also know that good health is not the only factor about which insurance companies are concerned in the issuance of policies. They know that insurability means more than good health."

In *Rosenbloom* v. *New York Life Ins. Co.*, W. D. Mo., 65 F.Supp. 692, Judge Ridge quotes with approval from the *Kirby* case and states (p. 696):

> "* * * From the opinion in the *Kirby* case, *supra*, and the authorities cited therein, it is manifest that the term 'insurability' is a term of art when used in conjunction with life insurance. 'Insurability' as a term of art signifies all those physical and moral factors reasonably taken into consideration by life insurance companies in determining coverage or matters affecting the risk."

In reversing the *Rosenbloom* case on other grounds this court said (163 F.2d 1, at p. 4):

> "* * * For the purposes of this opinion, we assume that 'insurability' may include elements other than health—such as vocation. * * *"

In *Kallman* v. *Equitable Life Assurance Society,* 248 App. Div. 146, 288 N.Y.S. 1032, the court speaks as follows:

> "* * * The distinction between 'good health' and 'insurability' might be illustrated in the case of a criminal condemned to death. On the eve of his execution he might be found to be in perfect physical condition, but it could not be reasonably contended that his situation did not affect his insurability. There are numerous circumstances which affect insurability. * * *"

In *Warren* v. *New York Life Ins. Co., supra,* the premium had been paid, and the insurability proviso was similar to that in the present case. Applicant had made negative answers to aviation questions. From investigation the insurer learned of applicant's flying, suspended the application, and requested applicant to fill out an aviation form. The applicant died in an automobile accident before this was done. Recovery was denied upon the basis that no insurance was in force. The insurability proviso is not discussed. However, in the District Court opinion, 37 F.Supp. 358, 362, in considering the materiality of false representations as to insurance, the court states, "The risk caused by participation in aeronautics is a serious one." In *Kirby* v. *Prudential Insurance Company of America, supra,* the court approved the finding of the trial judge against an applicant for reinstatement on the basis that the applicant was engaged in aeronautics and that such activities substantially increased the risk, stating that the trial court could not properly have found otherwise.

We find the reasoning of the cases holding "insurability" is broader than "good health" to be sound and convincing. For the purposes of our present case it is not necessary to determine just how broad the scope of the term "insurability" is. We are satisfied that an insurer is justified in taking into consideration a hazardous activity, such as flying, in determining insurability.

The undisputed evidence shows that the proposed insured had held a pilot's license since 1946, and that he had owned an interest in a plane continuously since 1951. He flew every Sunday when the weather permitted, and his 1954 license showed he reported 1450 hours of flying time. The evidence likewise establishes that the insurer uniformly declined to accept at standard rates risks of applicants engaged in flying. The company's policy in the case of applicants engaged in aviation was to require the applicant to fill out an aviation questionnaire which, among other things, asked the applicant whether, in the event the policy could not be delivered at standard rates, he desired a policy at standard rates with an aviation exclusion, or full coverage at extra premium. The extra premium for aviation coverage was $3.75 per thousand per year, which would have increased the premium on the policy applied for nearly 50 per cent.

The questions on the application pertaining to aviation were answered by applicant in the negative. The application contains a certification that the information appearing on the application is correctly recorded. Hinkle signed the application. Bliss testified that aviation questions were asked and the answers properly recorded. We have serious doubt whether there is any substantial evidence to the contrary. Mrs. Hansen, a fellow employee of applicant, who had testified in the case in chief, was recalled in rebuttal,

and testified that she was within a few feet of applicant's desk at the time the application was filled out. She said she didn't pay much attention to the conversation, but that she knew Mr. Hinkle flew frequently and to the best of her recollection she did not hear any mention of aviation.

In the briefs of the respective parties, each is seeking to blame the other for the false answers to the aviation questions, and to assert rights based upon such contentions. The trial court in its instructions to the jury said:

> "Now, ladies and gentlemen of the jury, my viewpoint is such of this case that it is wholly unimportant whether Mrs. Hansen heard part or all, or anything of that sort, because here is a contract that says if he were in good health at the time then there was temporary insurance that would pay his beneficiary the amount of the insurance. If he were not in good health then he is not entitled to recover regardless, because this conditional receipt only refers to an application. It makes no difference what was said in that application in my judgment. * * *"

Neither side excepted to the instructions given, or requested instructions on the theories they are now advancing. We do not believe that the question of who was responsible for the false answers as to aviation on the application is of any importance on this appeal. The defendant was not limited to information contained in the application in passing upon the question of insurability. The defendant had before it the information as to aviation before it acted on the application.

It is apparent that the application for insurance was for insurance at standard rates. The premium was paid upon the basis of standard rates. No information was disclosed by the applicant to the effect that he was engaged in

flying. The evidence conclusively shows that the proposed insured, because of his aviation activities, was not insurable for the amount, plan and rating applied for, and that the defendant made a good faith determination that he was not so insurable. The fact that Hinkle might have been able to obtain insurance at a higher rate is of no help to the plaintiff as such was not the coverage applied for.

Defendant in its pleadings asserts that if temporary insurance existed it was conditional, and that the insurance never became effective because the condition as to insurability was not met. This issue is also raised in the motions for a directed verdict and for judgment n.o.v. Plaintiff complains that the defendant did not fully investigate applicant's insurability. Sufficient information of applicant's aviation activities, evidence as to which was introduced at the trial, came to the defendant to warrant it in good faith to determine that the applicant was not an insurable risk for the plan applied for. The applicant died in an airplane crash the day following the application and before the application could have reached the home office. There was no time for investigation prior to the applicant's death. Any delay in the investigation under such circumstances was in no way prejudicial to plaintiff.

The defendant was legally entitled to have its motion for directed verdict sustained upon the basis that the insurance was not in effect at the time of the applicant's death, for the reason that the applicant did not, and could not, meet the insurability condition set out in the conditional receipt because of his aviation pursuits.

Other issues argued by the parties have been considered, but do not warrant discussion for the reason that what has heretofore been said compels a reversal.

The judgment appealed from is reversed, and this case is remanded with directions to enter judgment for defendant.

WOODBROUGH, Circuit Judge (Dissenting).

The controversy here grows out of a well known kind of transaction between the insurance company and a so-called "proposed insured" that is soundly helpful to the business of selling life insurance, but has been unhappily considered in such a way as to bring discredit on the companies and grief and suffering on certain unfortunate widows and orphaned children.

In the life insurance business it takes a little time for the companies to check on insurability of prospects and sometimes to adjust clerical or other incidental details and that little delay hampers the selling of life insurance on which the existence of the companies is dependent. To meet that condition, the insurance agents are supplied with the printed form such as was used in this case, headed in bold type "Conditional Receipt", the terms of which enable the agents to assure a prospective purchaser of life insurance that he will not be affected by that unavoidable little delay, but that if he is in good health, he will have (in this case) $10,500.00 insurance on his life in full force and effect from the day he delivers the amount of the first premium to the agent. The conditional receipt bears conspicuously the name of the company (in this case, New England Mutual Life Insurance Company) and the signature and counter signature of company officers; to-wit: General Agent and Secretary, and distinguishing between the time after the necessary delay when a proper policy is conditionally to be issued, and the time of the transaction, the General Agent inserts the date of the transaction

conspicuously in writing in the blank for that purpose so that the instrument reads, "Insurance applied for shall be in full force and effect from this date provided the proposed insured is now in good health"—(in this case the date of payment, February 25, 1955, was written in with a pen,) "2/25/1955" and the printing included "this day" (twice repeated) "this date" and "now"; all being used in the instrument to stress that the transaction relates to the undertaking of a present obligation by the company and not to the policy of life insurance that is to be issued later, only on certain conditions.

Laymen who are solicited in this transaction understand perfectly that when they pay the money and get the receipt, they have the company's obligation to pay if they die before the final closing of their insurance deal. In this case when the "proposed insured" left his home to go to his death the next day, after he made his payment to the agent, he left the "Conditional Receipt" the company gave him where his wife would find it and know he thought of her and believed he had provided for her.

The transaction with the company's agent that caused that belief was an entirely fair one and involved no discrimination in favor of the receipt holder and no unfair burden on the company.

In the first place if the proposed insured lied when he said he was in good health, there was no liability on the company. The first and only condition precedent to the obligation the company declared in its receipt, namely, that the insurance was immediately effective, was as above stated, that the "proposed insured is now in good health."

The other condition in the receipt was a condition subsequent to the company's obligation declared in the receipt to the effect that if, after its date, satisfactory evidence of

the proposed insured's insurability was not received at the company's home office in Boston or if the company determined he was not insurable, it would decline his application for a policy.

This condition of the receipt is not incompatible or in conflict with the company's obligation for "insurance in full force from this date." The two accord fully with each other. The words of the receipt make it perfectly plain that the company would not ultimately issue an insurance policy unless the company became satisfied of insurability. But that had nothing to do with the willingness of the company to make and fulfill the obligation concerning "insurance in effect from this date" declared in the receipt.

When Mr. Hinkle died, the day after the receipt had been delivered to him and his money had been accepted, all of the conditions upon the company's obligation to pay the amount of $10,500.00 specified in the receipt had become satisfied and the company should pay. The situation then was simply that the company had agreed that if Mr. Hinkle died the money would be paid and if he survived, the matter would go forward to the issuance of a policy or denial of it. After his death there was no point or sense in going on with any inquiry about his eligibility for a life insurance policy of any particular kind or about any other detail that might have come up if he had not died and if the transaction had been proceeded with.

There is no element of harshness or unfairness to the company or discrimination towards its patrons in the transaction with the receipt. The terms of the receipt protect the company and forestall such a consequence. The receipt specifies that on determining non-liability, the company will refund the payment made to it by the pro-

posed insured, but it does not state in express words what is to be done with the money paid on the happening of death while the "insurance is in full force from this date" before such company determination. Neither does it state what is to be done with the money if the policy issues. Manifestly the death obviated making the determination as to insurability so that the payment in the hands of the company has to be applied in accord with the necessary implication of the transaction in which it was paid and received.

The recital of the receipt is that the payment was "in connection with the application for insurance of $10,500.00 on the life of W. Max Hinkle" so that the company's right to apply it on the temporary coverage is complete and exactly as clear as its right to apply it on the first premium of a policy would have been if such policy had issued. So far as applying the payment is concerned, the same words cover both situations.

The payment manifestly was amply sufficient to fully compensate the company for the risk it took under its obligation for insurance in full force and effect from "this date". That is practically demonstrated by the fact that insurance for short term is daily and hourly sold throughout the country through vending machines that deliver a policy for $10,000.00 to anybody and everybody who deposits a fifty-cent coin in the slot. The record shows that the insurance herein was to cost $20.70 a quarter or $82.80 per year of 365 days or 22¢ a day.

In the transaction herein involved it is true the company stood to absolutely lose that 22¢ a day if Mr Hinkle lived and his application was declined. In that event it was obligated to refund the entire $20.70. But the part of that refund the company would lose if the company had

to make it probably would not equal the cost of the time of the agent soliciting or of an advertising calendar or gadget also risked to obtain a new policy holder who might well be expected to bring in hundreds or even thousands of dollars of premiums.

It might be only "petty stuff" to give a short year's insurance for a full year's premium, but it is such a serious wrong for a company to make a man believe it has insured him and to take his money therefor, if it does not so intend and I see no reason to ascribe such a thing to the company in this case.

I am not convinced that the few Iowa cases cited prohibit sustaining the judgment for the widow in this case. I would affirm the judgment.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment.)

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that New England Mutual Life Insurance Company of Boston, Massachusetts, have and recover against Maxine K. Hinkle, Administratix of the Estate of W. Max Hinkle, Deceased, and Maxine K. Hinkle, the sum of Three Hundred Eighty-one and 15/100

($381.15) Dollars for its costs in this behalf expended and have execution therefor.

And it is further Ordered by this Court that this cause, be, and the same is hereby remanded to the said District Court with directions to enter judgment for defendant.

November 5th, 1957.

Petition for Rehearing Denied, Dec. 6, 1957.

TURN TO

NEXT CARD